

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3
4 MARK MILLER,

5 Plaintiff,

6 v.

7 DAVID EVERETT, *et al.*,

8 Defendants.
9

3:16-cv-00128-VPC

ORDER

10 This action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(c)
11 and LR IB 2-1. Before the court is defendants' motion for summary judgment (ECF Nos. 67, 69
12 (sealed)). Plaintiff opposed (ECF No. 76), and defendants replied (ECF No. 79). For the reasons
13 stated below, the court grants defendant's motion for summary judgment (ECF No. 67).

14 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

15 Mark Miller ("plaintiff") is an inmate in the custody of the Nevada Department of
16 Corrections ("NDOC"), and currently housed at Northern Nevada Correctional Center ("NNCC")
17 in Carson City, Nevada. Pursuant to 42 U.S.C. § 1983, plaintiff brings this action against several
18 NDOC and NNCC officials.

19 On June 27, 2016, the District Court screened plaintiff's first amended complaint, allowing
20 three counts to proceed: 1) a conditions of confinement claim against defendants Everett, Keast,
21 Baca, Eaton, Aranas, and Meares; 2) a deliberate indifference claim against defendants Everett,
22 Keast, and Baca; and 3) a retaliation claim against defendants Everett, Keast, and Baca. (ECF No.
23 6.) On December 18, 2016, plaintiff filed a motion for leave to file a second amended complaint
24 (ECF No. 41), which the court granted (ECF No. 43). Plaintiff's second amended complaint was
25 filed on January 17, 2017 and asserts five claims (ECF No. 44). In Count I, plaintiff alleges that
26 defendants Everett, Keast, Baca, Eaton, Aranas, and Mears had knowledge of excessive noise and
27 failed to take corrective action in violation of his Eighth Amendment rights. (*Id.* at 6-10.)
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1 Additionally, in Count I, plaintiff alleges that defendants Everett, Keast, and Baca had knowledge
2 of his need for psychiatric care and refused to provide treatment in violation of his Eighth
3 Amendment rights. (*Id.* at 10-11.) In Count II, plaintiff asserts that defendants Baca, Clark, and
4 Henderson retaliated against him for filing grievances and pursuing litigation against them by
5 putting him in the “hole” and charging him with disciplinary infractions in violation of his First
6 Amendment rights. (*Id.* at 19-20.) In Count III, plaintiff alleges that defendants Sexton and
7 Scholfield failed to ensure that he received care from a licensed psychiatrist in violation of his
8 Eighth Amendment rights. (*Id.* at 21-22.) In Counts IV and V, plaintiff brings state law claims
9 against all defendants pertaining to elder abuse and inhumane treatment. (*Id.* at 23-24.)

10 Defendants now move for summary judgment asserting that: (1) plaintiff failed to exhaust
11 his administrative remedies in regards to his excessive noise claim; (2) plaintiff failed to exhaust
12 his administrative remedies in regards to his mental health care claim against defendants Everett,
13 Keast, and Baca; (3) defendants were not deliberately indifferent to plaintiff’s complaints of
14 excessive noise; (4) defendants were not deliberately indifferent to plaintiff’s request for mental
15 health treatment; (5) defendants Baca, Clark, and Henderson did not retaliate against plaintiff for
16 filing grievances; (6) plaintiff fails to adequately plead his state law claims; (7) plaintiff failed to
17 allege personal involvement of defendants Aranas and Eaton in regards to his Eighth Amendment
18 claims; and (8) defendants are entitled to qualified immunity.¹ (*See* ECF No. 67.)

19 II. LEGAL STANDARD

20 Summary judgment allows the court to avoid unnecessary trials. *Nw. Motorcycle Ass’n v.*
21 *U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The court properly grants summary
22 judgment when the record demonstrates that “there is no genuine issue as to any material fact and
23 the movant is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317,
24 330 (1986). “[T]he substantive law will identify which facts are material. Only disputes over
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26 ¹ Because the court finds that plaintiff failed to exhaust his administrative remedies in regards to his Eighth Amendment
27 claims against defendants Everett, Keast, Baca, Eaton, Aranas, and Meares, it need not address defendants’ substantive
28 arguments related to deliberate indifference or the supervisor liability of Aranas and Eaton. Further, because the court
finds that defendants were not deliberately indifferent and did not retaliate against plaintiff, it need not address
defendants’ qualified immunity defense.

1 facts that might affect the outcome of the suit under the governing law will properly preclude the
2 entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be
3 counted.” *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). A dispute is “genuine” only
4 where a reasonable jury could find for the nonmoving party. *Id.* Conclusory statements,
5 speculative opinions, pleading allegations, or other assertions uncorroborated by facts are
6 insufficient to establish a genuine dispute. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984
7 (9th Cir. 2007); *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996). At this stage,
8 the court’s role is to verify that reasonable minds could differ when interpreting the record; the
9 court does not weigh the evidence or determine its truth. *Schmidt v. Contra Costa Cnty.*, 693 F.3d
10 1122, 1132 (9th Cir. 2012); *Nw. Motorcycle Ass’n*, 18 F.3d at 1472.

11 Summary judgment proceeds in burden-shifting steps. A moving party who does not bear
12 the burden of proof at trial “must either produce evidence negating an essential element of the
13 nonmoving party’s claim or defense or show that the nonmoving party does not have enough
14 evidence of an essential element” to support its case. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*,
15 210 F.3d 1099, 1102 (9th Cir. 2000). Ultimately, the moving party must demonstrate, on the basis
16 of authenticated evidence, that the record forecloses the possibility of a reasonable jury finding in
17 favor of the nonmoving party as to disputed material facts. *Celotex*, 477 U.S. at 323; *Orr v. Bank*
18 *of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002). The court views all evidence and any
19 inferences arising therefrom in the light most favorable to the nonmoving party. *Colwell v.*
20 *Bannister*, 763 F.3d 1060, 1065 (9th Cir. 2014).

21 Where the moving party meets its burden, the burden shifts to the nonmoving party to
22 “designate specific facts demonstrating the existence of genuine issues for trial.” *In re Oracle*
23 *Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted). “This burden is not a light
24 one,” and requires the nonmoving party to “show more than the mere existence of a scintilla of
25 evidence. . . . In fact, the non-moving party must come forth with evidence from which a jury
26 could reasonably render a verdict in the non-moving party’s favor.” *Id.* (citations omitted). The
27 nonmoving party may defeat the summary judgment motion only by setting forth specific facts
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1 that illustrate a genuine dispute requiring a factfinder’s resolution. *Liberty Lobby*, 477 U.S. at 248;
2 *Celotex*, 477 U.S. at 324. Although the nonmoving party need not produce authenticated evidence,
3 Fed. R. Civ. P. 56(c), mere assertions, pleading allegations, and “metaphysical doubt as to the
4 material facts” will not defeat a properly-supported and meritorious summary judgment motion,
5 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

6 For purposes of opposing summary judgment, the contentions offered by a *pro se* litigant
7 in motions and pleadings are admissible to the extent that the contents are based on personal
8 knowledge and set forth facts that would be admissible into evidence and the litigant attested under
9 penalty of perjury that they were true and correct. *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir.
10 2004).

11 III. DISCUSSION

12 A. Civil Rights Claims Under § 1983

13 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority to
14 deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d 1063,
15 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir. 2000)). The statute
16 “provides a federal cause of action against any person who, acting under color of state law,
17 deprives another of his federal rights[,]” *Conn v. Gabbert*, 526 U.S. 286, 290 (1999), and therefore
18 “serves as the procedural device for enforcing substantive provisions of the Constitution and
19 federal statutes,” *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). Claims under § 1983
20 require a plaintiff to allege (1) the violation of a federally-protected right by (2) a person or official
21 acting under the color of state law. *Warner*, 451 F.3d at 1067. Further, to prevail on a § 1983
22 claim, the plaintiff must establish each of the elements required to prove an infringement of the
23 underlying constitutional or statutory right.

24 B. Failure to Exhaust Administrative Remedies

25 1. Exhaustion under the PLRA

26 Defendants argue that plaintiff did not properly exhaust available administrative remedies
27 as to his Count I claims. (ECF No. 67 at 6-9.) The PLRA provides that “[n]o action shall be
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1 brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by
2 a prisoner confined in any jail, prison, or other correctional facility until such administrative
3 remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). Exhaustion is mandatory. *Ross*
4 *v. Blake*, 136 S.Ct. 1850, 1856-57 (2016); *Porter v. Nussle*, 534 U.S. 516, 524 (2002). The PLRA
5 requires “proper exhaustion” of an inmate’s claims. *Woodford v. Ngo*, 548 U.S. 81, 90 (2006).
6 Proper exhaustion means an inmate must “use all steps the prison holds out, enabling the prison
7 to reach the merits of the issue.” *Griffin v. Arpaio*, 557 F.3d 1117, 1119 (9th Cir. 2009) (citing
8 *Woodford*, 548 U.S. at 90).

9 Failure to exhaust is an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 216 (2007). The
10 defendants bear the burden of proving that an available administrative remedy was unexhausted
11 by the inmate. *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014). If the defendants make such
12 a showing, the burden shifts to the inmate to “show there is something in his particular case that
13 made the existing and generally available administrative remedies effectively unavailable to him
14 by ‘showing that the local remedies were ineffective, unobtainable, unduly prolonged, inadequate,
15 or obviously futile.’” *Williams v. Paramo*, 775 F.3d 1182, 1191 (9th Cir. 2015) (quoting *Albino*,
16 747 F.3d at 1172). When a remedy is essentially “unknowable” such that no reasonable inmate
17 can make sense of what it demands, it is considered to be unavailable. *See Ross*, 136 S.Ct. at
18 1859-60.

19 **2. NDOC’s Inmate Grievance System**

20 The procedural rules relevant to exhaustion “are defined not by the PLRA, but by the prison
21 grievance process itself.” *Bock*, 549 U.S. at 218. The grievance process at NDOC institutions is
22 governed by Administrative Regulation (“AR”) 740.

23 NDOC’s grievance process features three levels, beginning with the informal grievance. If
24 an inmate is unable to resolve the issue through discussion with an institutional caseworker, the
25 inmate may file an informal grievance within six months “if the issue involves personal property
26 damages or loss, personal injury, medical claims or any other tort claims, including civil rights
27 claims,” or within ten days for any other issues, including classification and disciplinary. AR
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1 740.04, 740.05(4). The inmate's failure to submit the informal grievance within this time frame
2 "shall constitute abandonment of the inmate's claim at this, and all subsequent levels." *Id.* at
3 740.05(8). NDOC staff is required to respond within forty-five days. *Id.* at 740.05(12). An inmate
4 who is dissatisfied with the informal response may appeal to the formal level within five days. *Id.*

5 At the first formal level, the inmate must "provide a signed, sworn declaration of facts that
6 form the basis for a claim that the informal response is incorrect," and attach "[a]ny additional
7 relevant documentation." *Id.* at 740.06(2). The grievance is reviewed by an official of a higher
8 level, who has forty-five days to respond. *Id.* at 740.06(1), (4). Within five days of receiving a
9 dissatisfactory first-level response, the inmate may appeal to the second level, which is subject to
10 still-higher review. *Id.* at 740.07(1). Officials are to respond to a second-level grievance within
11 sixty days, specifying the decision and the reasons the decision was reached. *Id.* at 740.07(3), (4).
12 Once an inmate receives a response to the second-level grievance, he or she is considered to have
13 exhausted available administrative remedies and may pursue civil rights litigation in federal court.

14 **3. Exhaustion of Plaintiff's Count I Claim against Defendants Everett, Keast,**
15 **Baca, Eaton, Aranas, and Meares regarding Excessive Noise**

16 In the first portion of plaintiff's Count I claim, plaintiff asserts that defendants had
17 knowledge of excessive noise levels in plaintiff's unit, but failed to take corrective actions. (ECF
18 No. 44 at 6-10.) Defendants argue that plaintiff did not properly exhaust his available
19 administrative remedies, as he failed to follow the grievance procedure outlined by AR 740. (*See*
20 ECF No. 67 at 8.) Specifically, defendants contend that plaintiff failed to file a second level
21 grievance after filing numerous unsuccessful informal and first level grievances, and thus failed
22 to fully exhaust before filing his initial complaint. (*Id.*; *see also* ECF No. 67-8.) Plaintiff filed his
23 informal grievance on November 6, 2015, his first level grievance on November 21, 2015, another
24 first level grievance on January 24, 2016, and a second level on February 27, 2016. (*Id.*) Plaintiff
25 filed his complaint on March 4, 2016. (*See* ECF No. 1-1.) Plaintiff does not dispute that he failed
26 to file a second level grievance before initiating this lawsuit, but instead asserts that defendants
27 answered the grievance on the merits at the first level, which effectively waived any procedural
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1 defect and that he properly exhausted before filing his second amended complaint. (ECF No. 76
2 at 4-5.)

3 First, the court disagrees with plaintiff's argument that a response on the merits at the first
4 level waives any procedural defects. In a recent Ninth Circuit decision, the Court held that "a
5 prisoner exhausts 'such administrative remedies as are available,' 42 U.S.C. § 1997e(a), under the
6 PLRA despite failing to comply with a procedural rule[,] if prison officials ignore the procedural
7 problem and render a decision on the merits of the grievance at *each* available step of the
8 administrative process." *Reyes v. Smith*, 810 F.3d 654, 658 (9th Cir. 2016) (emphasis added).
9 Thus, to properly exhaust, plaintiff needed to fully grieve through the second, and final level of
10 NDOC's grievance procedure. A response on the merits at the first level does not satisfy the
11 requirements of exhaustion.

12 Next, plaintiff relies on *Rhodes v. Robinson (Rhodes II)*, to support his assertion that he
13 "properly" exhausted his administrative remedies before filing his second amended complaint.
14 (ECF No. 76 at 4 (citing *Rhodes v. Robinson (Rhodes II)*, 621 F.3d 1002 (9th Cir. 2010)).) In
15 *Rhodes II*, the court held that exhaustion of *new* claims satisfies the requirements of the PLRA as
16 long as exhaustion is completed prior to the filing of an amended complaint. *Rhodes II*, 621 F.3d
17 at 1005-1006. Here, plaintiff's claims regarding excessive noise were first alleged in plaintiff's
18 original complaint, filed on March 4, 2016 and therefore should have been exhausted prior to that
19 date. Accordingly, the court finds that plaintiff failed to exhaust his administrative remedies
20 pursuant to AR 740 prior to initiating this action.

21 The burden now shifts to plaintiff "to come forward with evidence showing that there is
22 something in his particular case that made the existing and generally available administrative
23 remedies effectively unavailable to him." *Albino*, 747 F.3d at 1172 (citing *Hilao v. Estate of*
24 *Marcos*, 103 F.3d 767, 778 n. 5 (9th Cir. 1996)). Plaintiff provides no evidence to show that
25 administrative remedies were unavailable to him. Plaintiff only asserts that defendants did not
26 respond to his second-level grievance. However, plaintiff initiated this lawsuit on March 4, 2016,
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1 just six days after his submitted his second level grievance and well before the sixty-day deadline
2 to respond to his second-level grievance had lapsed. (ECF No. 67-16 at 8.)

3 While plaintiff may disagree with the requirement to exhaust his administrative remedies
4 prior to initiating lawsuits, exhaustion plays a very important role in both the prison and court
5 settings. “Exhaustion gives an agency ‘an opportunity to correct its own mistakes with respect to
6 the programs it administers before it is haled into federal court,’ and it discourages ‘disregard of
7 [the agency’s] procedures.’” *Id.* at 89 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).
8 Exhaustion also “promotes efficiency.” *Id.* Plaintiff does not dispute that he failed to exhaust his
9 administrative remedies and he does not present any evidence that such remedies were effectively
10 “unavailable.” Accordingly, the court concludes that plaintiff failed to exhaust available
11 administrative remedies prior to filing this action as to his Count I excessive noise claims.

12 **4. Exhaustion of Plaintiff’s Count I Claim against Defendants Everett, Keast,**
13 **and Baca regarding Psychiatric Care**

14 In the second portion of plaintiff’s Count I claim, plaintiff asserts that defendants had
15 knowledge of his need for psychiatric care and refused to provide treatment. (ECF No. 76 at 10-
16 11.) Plaintiff first raised this issue in his First Amended Complaint, filed on June 28, 2016. (ECF
17 No. 7 at 9.) Plaintiff’s first grievance related to this issue, # 20063028314, was filed on July 5,
18 2016. (ECF No. 67-19 at 2.) Defendants assert that because plaintiff failed to file his informal
19 grievance until after the First Amended Complaint was filed, he did not properly exhaust his
20 administrative remedies. (*See* ECF No. 67 at 9.) Again, the court agrees. Plaintiff was required
21 to exhaust his administrative remedies prior to filing his complaint relating to the specific
22 allegations. *See Rhodes II*, 621 F.3d at 1005-06. In this case, plaintiff should have fully exhausted
23 prior to the date he filed his First Amended Complaint on June 28, 2016. Plaintiff failed to do so,
24 and thus failed to exhaust his administrative remedies. The burden now shifts to plaintiff to show
25 that these remedies were not available to him. *Albino*, 747 F.3d at 1172 (citing *Hilao*, 103 F.3d at
26 778 n. 5). Plaintiff again fails to provide evidence to show that administrative remedies were
27 unavailable to him. Plaintiff failed to exhaust his administrative remedies and he does not present
28 any evidence that such remedies were effectively “unavailable.” Accordingly, the court concludes

1 that plaintiff failed to exhaust available administrative remedies prior to filing this action as to his
2 Count I psychiatric care claims.

3 **C. Count II – First Amendment Retaliation Claim against Defendants Baca, Clark, and**
4 **Henderson**

5 Defendants argue that summary judgment should be granted in their favor as to the
6 retaliation claim because it fails as a matter of law. (ECF No. 67 at 16-18.)

7 It is well established in the Ninth Circuit that prisoners may seek redress for retaliatory
8 conduct by prison officials under § 1983. *Rhodes v. Robinson*, 408 F.3d 559, 567 (9th Cir. 2004);
9 *Brodheim v. Cry*, 584 F.3d 1262, 1269 (9th Cir. 2009). “Prisoners have a First Amendment right
10 to file grievances against prison officials and be free from retaliation for doing so.” *Watison v.*
11 *Carter*, 668 F.3d 1108, 1114 (9th Cir. 2012). A retaliation claim has five elements: (1) a state
12 actor took some adverse action against the inmate (2) because of (3) the inmate’s protected First
13 Amendment conduct, and that the action (4) chilled the inmate’s exercise of his First Amendment
14 rights and (5) did not reasonably advance a legitimate correctional goal. *Rhodes*, 408 F.3d at 567–
15 68. If the plaintiff fails to allege that the retaliation had a chilling effect, he or she may still state
16 a claim by alleging some other harm. *Id.* at 568 n.11.

17 **1. Defendant Baca**

18 In Count II, plaintiff alleges that defendant Baca ordered him to be placed in the “hole” in
19 retaliation for filing grievances and lawsuits. (ECF No. 44 at 19.) The court must consider whether
20 the record, when viewed in the light most favorable to plaintiff, contains evidence from which a
21 reasonable jury could conclude that defendant performed the adverse actions alleged. Defendants
22 argue that it does not (ECF No. 67 at 16-17), and the court agrees.

23 The record includes a sworn declaration from defendant Baca (ECF No. 67-22). Defendant
24 Baca asserts in his declaration that he did not retaliate against plaintiff for filing grievances or
25 lawsuits. (*Id.* at 3.) Defendant Baca further asserts that he did not order plaintiff to be removed or
26 discharged from the infirmary, but that medical staff discharged plaintiff to Unit 7A because he
27 was not approved to go to the general population. (*Id.*) Further, defendant Baca asserts that he did
28 not order plaintiff to be sent to the “hole.” (*Id.*) An examination of plaintiff’s case note report

1 indicates that the decision to move plaintiff from the infirmary was made by medical staff because
2 plaintiff had “been discharged.” (ECF No. 69-5 at 2.) There is no evidence in the record showing
3 that defendant Baca placed plaintiff in the “hole.”

4 Plaintiff fails to respond to defendant’s argument in his opposition to defendants’ motion
5 for summary judgment. (See ECF No. 76.) Plaintiff’s vague and conclusory allegations cannot
6 carry plaintiff’s burden in opposing defendant’s sworn declaration at the summary judgment stage.
7 *Nelson v. Pima Community College*, 83 F.3d 1075, 1081-82 (9th Cir. 1996) (“mere allegation and
8 speculation do not create a factual dispute for purposes of summary judgment”). Accordingly,
9 plaintiff has not shown that a material dispute exists as to whether defendant Baca performed the
10 adverse action alleged, and summary judgment in defendant’s favor is proper.

11 **2. Defendant Clark**

12 In Count II, plaintiff alleges that defendant Clark filed a notice of charges against him in
13 retaliation for filing grievances and lawsuits against Baca. (ECF No. 44 at 19.) The court must
14 consider whether the record, when viewed in the light most favorable to plaintiff, contains evidence
15 from which a reasonable jury could conclude that defendants performed the adverse actions alleged.
16 Defendants argue that it does not (ECF No. 67 at 17-18), and the court agrees.

17 The record includes a sworn declaration from defendant Clark (ECF No. 67-14). Defendant
18 Clark asserts in his declaration that on June 7, 2016, plaintiff removed his own trach and feeding
19 tubes, requiring him to be transported to the Carson Tahoe Regional Medical Facility for treatment.
20 (*Id.* at 2.) Defendant Clark asserts that as a result of plaintiff’s self-harm, there was a disruption to
21 the normal operations of the facility, additional medical expenses and transportation costs were
22 incurred, and overtime was required to provide additional coverage of plaintiff during his transport
23 and time in the hospital. (*Id.*) Defendant Clark asserts that as a result of plaintiff’s actions, Clark
24 wrote a notice of charges, OIC #408968 for self-mutilation and unauthorized use of equipment.
25 (*Id.*) Further, defendant Clark asserts that he was unaware of any grievances or lawsuits filed by
26 plaintiff, and Clark wrote the notice of charges because plaintiff removed his own medical devices
27 causing a disruption to the operation of the institution. (*Id.* at 2-3.) The record indicates that
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1 plaintiff plead guilty to the self-mutilation charge, thus acknowledging that he violated prison rules.
2 (ECF No. 67-15 at 2-3.)

3 Again, plaintiff fails to respond to defendant's argument in his opposition to defendants'
4 motion for summary judgment. (*See* ECF No. 76.) Plaintiff's vague and conclusory allegations
5 cannot carry plaintiff's burden in opposing defendant's sworn declaration at the summary judgment
6 stage. *Nelson*, 83 F.3d at 1081-82. Accordingly, plaintiff has not shown that a material dispute
7 exists as to whether defendant Clark performed the adverse action alleged, and summary judgment
8 in defendant's favor is proper.

9 **3. Defendant Henderson**

10 In Count II, plaintiff alleges that defendant Henderson filed a notice of charges against him
11 in retaliation for filing grievances and lawsuits against her and her coworkers. (ECF No. 44 at 20.)
12 The court must consider whether the record, when viewed in the light most favorable to plaintiff,
13 contains evidence from which a reasonable jury could conclude that defendants performed the
14 adverse actions alleged. Defendants argue that it does not (ECF No. 67 at 18), and the court agrees.

15 The record includes a sworn declaration from defendant Henderson (ECF No. 69-2).
16 Defendant Henderson asserts in her declaration that on May 16, 2016, she went to see plaintiff at
17 his request. (*Id.* at 3.) Defendant Henderson states she observed plaintiff banging on his cell door
18 window with a plastic trash can. (*Id.*) When defendant Henderson asked plaintiff how she could
19 help, plaintiff proceeded to yell at Henderson and blame her for alleged mental health abuse. (*Id.*)
20 Henderson asserts that plaintiff was verbally abusive and threatened her. (*Id.*) Due to this
21 interaction, defendant Henderson wrote a notice of charges against plaintiff. (*Id.*) Defendant
22 Henderson asserts that she was not aware of any litigation or specific grievances that plaintiff had
23 filed. (*Id.*)

24 In his opposition, plaintiff argues that the charges against him were dismissed and the
25 hearing officer stated "that informing a prison employee that they will be held accountable in court,
26 as plaintiff did with defendant Henderson, does not constitute making a threat." (ECF No. 76 at 7.)
27 Based on this, plaintiff asserts that this is a "classic case of retaliation." (*Id.* at 8.) However, aside
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1 from plaintiff's allegations, he does not provide any evidence that defendant Henderson had
2 knowledge of litigation or grievances. Plaintiff's vague and conclusory allegations cannot carry
3 plaintiff's burden in opposing defendant's sworn declarations at the summary judgment stage.
4 *Nelson*, 83 F.3d at 1081-82. Accordingly, plaintiff has not shown that a material dispute exists as
5 to whether defendant Henderson performed the adverse action alleged, and summary judgment in
6 defendant's favor is proper.

7 **D. Count III - Eighth Amendment Deliberate Indifference Claim against Defendants**
8 **Sexton and Scholfield**

9 In Count III, plaintiff alleges that defendants Sexton and Schofield failed to ensure plaintiff
10 received care from a licensed psychiatrist, which amounts to deliberate indifference in violation
11 of the Eighth Amendment. (ECF No. 44 at 22.)

12 The Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized
13 standards, humanity, and decency" by prohibiting the imposition of cruel and unusual punishment
14 by state actors. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal quotation omitted). The
15 Amendment's proscription against the "unnecessary and wanton infliction of pain" encompasses
16 deliberate indifference by state officials to the medical needs of prisoners. *Id.* at 104 (internal
17 quotation omitted). It is thus well established that "deliberate indifference to a prisoner's serious
18 illness or injury states a cause of action under § 1983." *Id.* at 105.

19 Courts in this Circuit employ a two-part test when analyzing deliberate indifference claims.
20 The plaintiff must satisfy "both an objective standard—that the deprivation was serious enough to
21 constitute cruel and unusual punishment—and a subjective standard—deliberate indifference."
22 *Colwell v. Bannister*, 763 F.3d 1060, 1066 (9th Cir. 2014) (internal quotation omitted). First, the
23 objective component examines whether the plaintiff has a "serious medical need," such that the
24 state's failure to provide treatment could result in further injury or cause unnecessary and wanton
25 infliction of pain. *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). Serious medical needs
26 include those "that a reasonable doctor or patient would find important and worthy of comment or
27 treatment; the presence of a medical condition that significantly affects an individual's daily
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1 activities; or the existence of chronic and substantial pain.” *Colwell*, 763 F.3d at 1066 (internal
2 quotation omitted).

3 Second, the subjective element considers the defendant’s state of mind, the extent of care
4 provided, and whether the plaintiff was harmed. “Prison officials are deliberately indifferent to a
5 prisoner’s serious medical needs when they deny, delay, or intentionally interfere with medical
6 treatment.” *Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) (internal quotation omitted).
7 However, a prison official may only be held liable if he or she “knows of and disregards an
8 excessive risk to inmate health and safety.” *Toguchi v. Chung*, 391 F.3d 1050, 1057 (9th Cir.
9 2004). The defendant prison official must therefore have actual knowledge from which he or she
10 can infer that a substantial risk of harm exists, and also make that inference. *Colwell*, 763 F.3d at
11 1066. An accidental or inadvertent failure to provide adequate care is not enough to impose
12 liability. *Estelle*, 429 U.S. at 105–06. Rather, the standard lies “somewhere between the poles of
13 negligence at one end and purpose or knowledge at the other” *Farmer v. Brennan*, 511 U.S.
14 825, 836 (1994). Accordingly, the defendants’ conduct must consist of “more than ordinary lack
15 of due care.” *Id.* at 835 (internal quotation omitted).

16 As to the objective element of the deliberate indifference test, defendants do not dispute
17 that plaintiff’s mental health treatment constituted a “serious medical need;” thus, this element has
18 been satisfied and the court will now address the subjective element.

19 As to the subjective element, plaintiff argues that defendants have been deliberately
20 indifferent to his mental health treatment, as they have failed to ensure plaintiff received
21 psychotropic medications and treatment from a licensed psychiatrist for his bipolar disorder. (ECF
22 No. 44 at 22.) Defendants argue that the evidence shows they were not deliberate indifferent to
23 plaintiff’s request for mental health treatment. (ECF No. 67 at 13-15.)

24 Plaintiff’s claim that he has not received proper mental health treatment or medication is
25 belied by the record. Plaintiff’s medical records reveal that plaintiff has been seen on numerous
26 occasions by various psychologists, psychiatrist Dr. Grant Lee, and advanced nurse practitioner
27 Teodoro Manalang. (See ECF Nos. 69-3, 69-7, 69-8.) Further, plaintiff’s medical records reveal
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1 that he was prescribed and received several psychotropic medications. (See ECF No. 69-9.)
2 Plaintiff's main contention seems to be that he was seen by psychologists and an advanced nurse
3 practitioner. However, it is common and accepted practice to use nurse practitioners for mental
4 health treatment. (ECF No. 69-3.) While plaintiff may not have agreed with defendants' choice of
5 treatment (use of psychologists and nurse practitioner), this does not amount to deliberate
6 indifference. See *Toguchi*, 391 F.3d at 1058. Defendants must knowingly *disregard* a medical
7 condition. In cases where the inmate and prison staff simply disagree about the course of treatment,
8 only where it is medically unacceptable can the plaintiff prevail. *Id.* Such is not the case here. In
9 sum, defendants' conduct was the opposite of conscious indifference to plaintiff's medical needs.
10 The evidence in the record shows that plaintiff's mental health needs were fully addressed by
11 defendants. Therefore, plaintiff's Eighth Amendment rights were not violated and defendants' are
12 entitled to summary judgment.

13 **E. Counts IV and V – Supplemental Jurisdiction Claims against all Defendants**

14 In Counts IV and V, plaintiff brings state law claims for elder abuse under NRS 41.1395
15 and inhumane treatment under NRS 209.371, against all defendants. (ECF No. 44 at 23-24.)

16 Plaintiff asserts that the actions of defendants constitute “the willful neglect and abuse of
17 him, an older, vulnerable person,” and these acts have “caused him to suffer physical pain and
18 extreme, prolonged mental anguish to such an extent that it constitutes inhumane treatment.” (*Id.*)
19 Plaintiff's accusations are vague and conclusory, entirely devoid of factual detail and similarly
20 lacking in evidentiary support at this stage. As discussed above, plaintiff's medical records show
21 that plaintiff received regular medical and mental health treatment. (See ECF Nos. 69-7, 69-8.)
22 There is no evidence in the record supporting plaintiff's claims that he was subjected to elder abuse
23 or inhumane treatment. Further, plaintiff fails to address defendants' argument in his opposition.
24 (ECF No. 76.) Accordingly, because the record clearly shows that plaintiff received adequate
25 medical and mental health treatment, plaintiff's claims fail as a matter of law, and defendants are
26 entitled to summary judgment.

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IT IS FURTHER ORDERED that the Clerk **ENTER JUDGMENT** and close this case.

DATED: August 15, 2017.

Valerie P. Poole
UNITED STATES MAGISTRATE JUDGE